

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M.GANGA RAO
WRIT PETITION NOS. 4415, 4807, 40975, 41739,
43051 OF 2016 AND 2842 OF 2017

COMMON ORDER
(Per Sri Justice Sanjay Kumar)

The core issue being one and the same in all these cases, they are amenable to disposal by way of this common order.

W.P.No.4415 of 2016

The State of Telangana and its Engineer-in-Chief, Irrigation and Command Area Development Department, filed this writ petition aggrieved by the common order dated 12.08.2015 passed by the Andhra Pradesh Administrative Tribunal, Hyderabad (for brevity, 'the Tribunal'), in so far as it pertained to O.A.No.6563 of 2011. The said O.A. was filed by respondents 1 and 2 in this writ petition assailing the validity of G.O.Ms.No.5, Social Welfare (SW.ROR.1) Department, dated 14.02.2003 and G.O.Ms.No.26, Social Welfare (ROR.1) Department, dated 20.02.2009. By the common order dated 12.08.2015, the Tribunal quashed G.O.Ms.No.26 dated 20.02.2009.

By order dated 11.02.2016, this Court granted interim suspension of the order under challenge. Respondents 6 and 7 got themselves impleaded in this writ petition in November, 2016. Both of them filed applications to vacate the interim order. Thereafter, by order dated 31.01.2017, this Court took note of the submission made on their behalf that while these cases were pending consideration before this Court, the State was proceeding to make promotions and observed that if steps were taken during the pendency of this litigation and third party interests were involved, the same would be liable to be set at naught if found to be illegal. This Court also made it clear

that such third parties need not be put on notice while doing so, as any rights created in their favour would be hit by the doctrine of *lis pendens*.

W.P.No.4807 of 2016

Devarakonda Asha Rani, a Superintending Engineer in the Roads and Buildings Department of the State of Telangana, being a third party to the litigation before the Tribunal, obtained leave and assailed the common order dated 12.08.2015 passed by the Tribunal in O.A.No.6563 of 2011 and batch.

W.P.No.40975 of 2016

This writ petition was filed by V.Sharadha, Superintending Engineer of the Roads and Buildings Department in the State of Telangana, seeking a declaration that G.O.Ms.No.26 dated 20.02.2009 is illegal as it was issued by the Social Welfare Department and could not be applied to other Departments in the State. Respondents 5 to 10 got themselves impleaded in this writ petition in January, 2017.

W.P.No.41739 of 2016

This writ petition was filed by Dr.Ch.Vasantha, Superintending Engineer of the National Highways in the State of Telangana, seeking a declaration that there was no valid provision in the Roads and Buildings Engineering Service for reservation in promotions and assailing G.O.Ms.No.5 dated 14.02.2003, G.O.Ms.No.21 dated 18.03.2003, G.O.Ms.No.123 dated 19.04.2003, G.O.Ms.No.2 dated 09.01.2004 and G.O.Ms.No.26 dated 20.02.2009. Respondents 3 to 10 got themselves impleaded in this writ petition in January, 2017.

W.P.No.43051 of 2016

M.Naveen Kumar and K.Vijaya Nalini, Assistant Section Officers in the Revenue Department of the State of Telangana, filed this writ petition assailing G.O.Ms.No.123 dated 19.04.2003 and G.O.Ms.No.26 dated

20.02.2009. Respondents 5 to 10 got themselves impleaded in this writ petition in January, 2017. The State of Andhra Pradesh, through the Chief Secretary of its General Administration Department and the Chief Secretary of its Social Welfare Department, came to be impleaded as respondents 11 and 12 respectively in March, 2017.

W.P.No.2842 of 2017

This writ petition was filed by D.Lalitha Kumari, a Section Officer in the Panchayat Raj Department of the State of Telangana, after obtaining leave as she was not a party to the proceedings which she sought to challenge. Her prayer was to quash the common order dated 12.08.2015 passed by the Tribunal in O.A.No.6563 of 2011 and batch. Respondent No.10 got himself impleaded in this writ petition in January, 2017.

The issue that arises for consideration in this batch of cases is with regard to reservation in promotions in favour of the Scheduled Castes and the Scheduled Tribes in State services and the consequential seniority sought to be conferred upon such promotees.

Both these concepts trace their origin to Article 16(4A) of the Constitution. Article 16(4A) was inserted in the Constitution by the Constitution (Seventy-seventh Amendment) Act, 1995, with effect from 17.06.1995. Initially, this Article only enabled the State to make provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes which were not adequately represented in such services. Thereafter, by the Constitution (Eighty-fifth Amendment) Act, 2001, which was given retrospective effect from 17.06.1995, Article 16(4A) was modified enabling the State to make provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of

Scheduled Castes and Scheduled Tribes which were not adequately represented in such services with consequential seniority.

Referring to Article 16(4A) of the Constitution, the erstwhile Government of Andhra Pradesh issued G.O.Ms.No.5 dated 14.02.2003 stating as under:

'4. The Government after careful consideration, have decided to implement rule of reservation in promotion to ensure adequate representation of the Scheduled Caste and Scheduled Tribe employees, ie. 15% and 6% respectively in all categories of posts in departments. The Government therefore direct that;

- a) Reservation shall be implemented in favour of Scheduled Castes and Scheduled Tribes in promotion in all categories of posts in all State Government departments with immediate effect.
- b) Reservation in promotion in favour of Scheduled Castes and Scheduled Tribes is applicable to all categories or cadres whose cadre strength is more than five.
- c) The Existing 100 point roster already prescribed in Rule 22 of the Andhra Pradesh State and Subordinate Service Rules by the State Government shall be followed in cases of promotion in all the categories where reservation in promotion in favour of Scheduled Castes and Scheduled Tribes is followed.
- d) Reservation in promotion in favour of Scheduled Castes and Scheduled Tribes shall be prospective and shall be made applicable to the posts to be filled up. As on the date of issue of these orders, the Panel year for 2002-2003 has already commenced from 1st September, 2002 and therefore the panels already prepared and given effect shall not be disturbed. The Panels which are not yet prepared shall now be prepared based on rule of reservation in promotion and Panels prepared and not given effect to, shall be reviewed on the principle of reservation in promotion in favour of Scheduled Castes and Scheduled Tribes.
- e) Reservation in promotion in favour of Scheduled Castes and Scheduled Tribes shall be applicable to those candidates who are fully qualified and eligible to hold the post as per existing Rules and guidelines.

- f) Reservation in promotion in favour of Scheduled Castes and Scheduled Tribes shall also apply to other institutions in which reservation in respect of Scheduled Castes and Scheduled Tribes is followed.
- g) Detailed guidelines on filling up the roster points based on the rule of reservation in promotions will be issued separately.

5. Appropriate amendment to Rule 22 of the Andhra Pradesh State and Subordinate Service Rules, 1996 will be issued separately.'

Thereafter, G.O.Ms.No.21 dated 18.03.2003 was issued stipulating the detailed guidelines for effecting reservation in promotions in favour of Scheduled Castes and Scheduled Tribes. This was followed by G.O.Ms.No.123 dated 19.04.2003, whereby amendments were made to the Andhra Pradesh State and Subordinate Service Rules, 1996 (for brevity, 'the Rules of 1996'). Thereafter, G.O.Ms.No.2 dated 09.01.2004 was issued clarifying certain issues in relation to the policy of effecting reservations in promotions in favour of Scheduled Castes and Scheduled Tribes. Certain amendments were then effected to G.O.Ms.No.2 dated 09.01.2004, by way of G.O.Ms.No.18 dated 17.02.2005. The last in the series of G.Os and the most important one is G.O.Ms.No.26 dated 20.02.2009. By way of this G.O., the erstwhile Government of Andhra Pradesh amended G.O.Ms.No.5 dated 14.02.2003 by substituting paragraph 4(a) therein and adding paragraph 4(h). The amendment, as set out in G.O.Ms.No.26 dated 20.02.2009, reads as under:

'A M E N D M E N T'

In the said G.O.,

- (1) for paragraph 4(a), the following shall be substituted, namely;
 "(a) Reservation shall be implemented with consequential seniority in favour of Scheduled Castes and Scheduled Tribes in promotion in all categories of posts in all State Government Departments with immediate effect".
- (2) after paragraph 4(g), the following shall be added, namely:-

“(h) For the purpose of achieving adequacy of Scheduled Castes/Scheduled Tribes in services, the Rule of Reservation in making Incharge arrangements in exigencies of administration for holding higher promotional posts shall be followed, whenever such arrangements are made after obtaining relaxation of Rule 10 (h) of A.P. State and Subordinate Service Rules, 1996.’

This being the factual background, perusal of the common order dated 12.08.2015 passed by the Tribunal in O.A.No.6563 of 2011 and batch demonstrates that the Tribunal was of the opinion that G.O.Ms.No.26 dated 20.02.2009, being in the nature of an executive order, could not prevail over the statutory Rules of 1996 and the direction to extend consequential seniority contained in G.O.Ms.No. No.26 dated 20.02.2009 was in conflict with Rules 33 and 34 of the Rules of 1996 relating to seniority. The Tribunal further opined that as G.O.Ms.No.26 dated 20.02.2009 was issued by the Social Welfare Department of the State and not its General Administration Department, it could operate within the Social Welfare Department only and could have no operational effect on other Departments. It was on these grounds that the Tribunal quashed G.O.Ms.No.26 dated 20.02.2009.

At this stage, it would be relevant to note that the validity, interpretation and implementation of the Seventy-seventh, Eighty-first, Eighty-second and Eighty-fifth Constitutional Amendment Acts fell for consideration before a Constitution Bench in *M.NAGARAJ V/ s. UNION OF INDIA*¹. The conclusions recorded by the Constitution Bench are relevant for the purposes of the cases on hand and they read as under:

‘Conclusion

The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for

¹ (2006) 8 SCC 212

reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one hand and SCs and STs on the other hand as held in *Indra Sawhney*, the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal*.

We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.

We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate Bench in accordance with law laid down by us in the present case.

Reference is answered accordingly.'

Be it noted that this judgment was delivered on 19.10.2006. It is relevant to note that G.O.Ms.No.5 dated 14.02.2003, which was issued more than three years prior to *M.NAGARAJ*¹, straightaway provided for

reservation in promotions being implemented in favour of Scheduled Castes and Scheduled Tribes in all categories of posts in all State Government Departments with immediate effect. Even without the elaborate judgment in M.NAGARAJ¹, Article 16(4A), being a merely enabling provision, empowered the State to make any provision for reservation in matters of promotion in the services under the State in favour of Scheduled Castes and Scheduled Tribes 'if the State was of the opinion that they were not adequately represented in such services'. Therefore, the State necessarily had to undertake an exercise to determine whether there was adequate representation of the Scheduled Castes and Scheduled Tribes in each such service where reservation in promotions was sought to be implemented. However, G.O.Ms.No.5 dated 14.02.2003 does not reflect any such exercise having been undertaken and it did not even direct such an exercise being undertaken prior to actual implementation of such reservations. Even the so-called detailed guidelines issued thereafter under G.O.Ms.No.21 dated 18.03.2003 did not advert to any such exercise being undertaken. It was only by way of G.O.Ms.No.2 dated 09.01.2004 that the Government of Andhra Pradesh issued certain clarifications with regard to computation of the adequacy of representation. By way of G.O.Ms.No.26 dated 20.02.2009, G.O.Ms.No.5 dated 14.02.2003 was amended making room for consequential seniority being conferred upon the promotee Scheduled Castes and Scheduled Tribes on the strength of the reservations extended to them in promotions.

That being said, this Court is at a loss to understand as to how the Tribunal could have held G.O.Ms.No.26 dated 20.02.2009 to be illegal on the ground that it was issued by the Social Welfare Department of the State and therefore could not be extended to other departments. Be it noted that

G.O.Ms.No.5 dated 14.02.2003 was also issued by the Social Welfare Department of the State. It was however not issued through the Principal Secretary of that department but through the Chief Secretary to the Government. By the said G.O., the policy of reservation in promotions in favour of Scheduled Castes and Scheduled Tribes was extended to all categories of posts in all State Government Departments. Similarly, G.O.Ms.No.26 dated 20.02.2009, being an instrument to merely amend G.O.Ms.No.5 dated 14.02.2003, was also issued by the Social Welfare Department of the State but again through the Chief Secretary to the Government. When the main G.O. issued by the Social Welfare Department was left untouched and continued to operate in all departments of the State, the amendment thereto through the same Social Welfare Department ought not to have been held to be illegal on that count. Nothing was stated by the Tribunal with regard to the applicable Business Rules, whereby such an inference could have been drawn that the Government could issue general rules only through its General Administration Department and not through any other, even if it was the Chief Secretary to the Government who issued the Government Order.

Further, the opinion of the Tribunal that G.O.Ms.No.26 dated 20.02.2009 conflicted with the Rules of 1996 and was therefore liable to be set aside also cannot be countenanced. The constitutional scheme underlying Article 16(4A) is that the State is empowered thereby to make provision for reservation in promotions in favour of the Scheduled Castes and Scheduled Tribes in such State services wherein they were not adequately represented. It was therefore an enabling provision. G.O.Ms.No.5 dated 14.02.2003 and G.O.Ms.No.26 dated 20.02.2009, though they are worded as positive directions, would have to be read down and understood in the context of the

constitutional scheme of Article 16(4A), as spelt out in clear terms by the Supreme Court in *M.NAGARAJ*¹. These Government Orders would therefore have to be construed as enabling provisions put in place by the State Government, but before giving effect to reservation in promotions in favour of Scheduled Castes and Scheduled Tribes in State services with consequential seniority, the exercise detailed in *M.NAGARAJ*¹, set out *supra*, would necessarily have to be undertaken. In this context, it may also be noted that the said exercise would now stand modified to some extent by the later decision of the Supreme Court in *JARNAIL SINGH V/ s. LACHHMI NARAIN GUPTA*². The relevant observations in *JARNAIL SINGH*² read as under:

‘The whole object of reservation is to see that backward classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were. This being the case, it is clear that when a Court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution of India. The caste or group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. Even these persons who are contained within the group or sub-group in the Presidential Lists continue to be within those Lists. It is only when it comes to the application of the reservation principle under Articles 14 and 16 that the creamy layer within that sub-group is not given the benefit of such reservation.

..... Similarly, Constitutional Courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-groups when applying the principles of equality under Articles 14 and 16 of the Constitution of India. We do not agree with Balakrishnan, C.J.'s

² 2018 LawSuit (SC) 943

statement in Ashoka Kumar Thakur that the creamy layer principle is merely a principle of identification and not a principle of equality.

Therefore, when Nagaraj applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power Under Article 341 or Article 342.

... .. Thus, we may make it clear that quantifiable data shall be collected by the State, on the parameters as stipulated in Nagaraj on the inadequacy of representation, which can be tested by the Courts. We may further add that the data would be relatable to the concerned cadre.

.....

Thus, we conclude that the judgment in Nagaraj does not need to be referred to a seven-Judge Bench. However, the conclusion in Nagaraj that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in Indra Sawhney is held to be invalid to this extent.'

In the light of the aforestated binding edicts of the Supreme Court in M.NAGARAJ¹ and JARNAIL SINGH², the State is bound to undertake the full exercise as set out in these judgments before implementing reservation in promotions with consequential seniority. Such an exercise would have to be an ongoing exercise every time such a policy is sought to be implemented and cannot be a one-time measure.

However, as already noted *supra*, the erstwhile Government of Andhra Pradesh seems to have proceeded under the impression that it had *carte blanche* power to straightaway implement such reservations without even undertaking the bare exercise of determining adequacy of representation, clearly emanating from Article 16(4A) of the Constitution. However, as none of the promotees who benefited from such reservation policy since its inception in the year 2003 have been impleaded to this litigation, we do not propose to go into the validity of such implementation. That being said, the State cannot be allowed to present a *fait accompli* to

this Court, having ignored the mandate of Article 16(4A) of the Constitution and the directives of the Supreme Court in M.NAGARAJ¹ delivered in 2006.

Be it noted that G.O.Ms.No.26 dated 20.02.2009 was issued long after the said judgment but, yet again, there was no direction by the State Government to undertake the exercise as mandated thereby on an individual cadre basis. Therefore, at least the promotions made by giving effect to such reservation policy after institution of O.A.No.6563 of 2011 would have to be reviewed in strict accordance with the directives of the Supreme Court in M.NAGARAJ¹ and JARNAIL SINGH². As the erstwhile State of Andhra Pradesh came to be bifurcated under the A.P. Reorganization Act, 2014, this exercise would have to be undertaken by the present States of Telangana and Andhra Pradesh. Needless to state, the affected parties shall be afforded an opportunity of hearing in the process of such review. This exercise shall be completed expeditiously and in any event, not later than six months from the date of receipt of a copy of this order.

On the above analysis, W.P.Nos.4415 and 4807 of 2016 and 2842 of 2017 are allowed setting aside the common order dated 12.08.2015 passed by the Andhra Pradesh Administrative Tribunal, Hyderabad, in O.A.No.6563 of 2011 and batch. The Government Orders and more particularly, G.O.Ms.No.5 dated 14.02.2003 and G.O.Ms.No.26 dated 20.02.2009 are read down to merely enable the State to implement the policy of reservation in promotions if the necessary conditions are made out and in pursuance thereof, every department of the State which seeks to implement the policy of reservation in promotions with consequential seniority in favour of Scheduled Castes and Scheduled Tribes in any particular cadre would have to undertake the full exercise as per the mandate of the Supreme Court in M.NAGARAJ¹ and JARNAIL SINGH² before doing so every time.

W.P.Nos.40975, 41739 and 43051 of 2016 are disposed of in terms of the above directions.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final common order. No order as to costs.

SANJAY KUMAR,J

M.GANGA RAO,J

11th DECEMBER, 2018
PGS

